UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DESIGN BASICS, LLC; and
PLAN PROS, INC.

Plaintiffs **Case No: 2:16-CV-429**

v.

MARK WINTER HOMES, INC.; ELEMENTS BY MARK WINTER HOMES, LLC; MARK WINTER CUSTOM HOMES, LLC; ALLIANCE PROPERTIES, LP; BROOK FARMS PROPERTIES, LLC MARTON PROPERTIES, LLC; *and* MARK J. WINTER **JURY DEMANDED**

Defendants

PLAINTIFFS' COMPLAINT FOR COPYRIGHT INFRINGEMENT

Plaintiff, Design Basics, LLC ("DB") and Plan Pros, Inc. ("PPI")(collectively, "Plaintiffs") by their attorneys, Dana A. LeJune and Michael T. Hopkins, file this cause of action against the Defendants, Mark Winter Homes, Inc. ("MWH"), Elements by Mark Winter Homes, LLC ("Elements"), Mark Winter Custom Homes, LLC ("Custom"); Alliance Properties, LP, ("APL"); Brook Farms Properties, LLC ("BFP"); and Marton Properties, LLC ("MPL")(collectively the "Entity Defendants"), and Mark J. Winter, Individually ("Winter") (collectively, "Defendants") and show:

Jurisdiction and Venue

1. The Court has subject matter jurisdiction in this action pursuant to 28 USC §1331 and §1338(a) as this case arises under the U.S. Copyright Act.

2. Venue is proper in this Court pursuant to 28 USC §1400(a) as the Defendants reside and/or maintain a principal place of business in this District.

Parties

3. Plaintiff, DB is a Nebraska limited liability company engaged in the business of creating, publishing and licensing architectural plans and designs, with its principal office located in Omaha, Nebraska.

4. Plaintiff, PPI, is a Nebraska corporation engaged in the business of creating, publishing and licensing architectural plans and designs, with its principal office located in Omaha, Nebraska.

5. The Defendant, MWH is a for-profit Wisconsin corporation with its principal office located in Appleton, Wisconsin. MWH is in the business of marketing, development, construction and sales of residential houses. MWH is registered for service through its registered agent, Mark J. Winter at 2025 N. Casaloma Drive, Appleton, WI 54913.

6. The Defendant, Elements is a for-profit Wisconsin limited liability company with its principal office located in Appleton, Wisconsin. Upon information and believe, Elements is in the business of marketing, development, construction, and sales of residential houses. Elements is registered for service through its registered agent, Mark J. Winter at 2025 N. Casaloma Drive, Appleton, WI 54913.

7. The Defendant, Custom is a for-profit Wisconsin limited liability company with its principal office located in Appleton, Wisconsin. Custom is in the business of marketing, development, construction, and sales of residential houses. Custom is registered for service through its registered agent, Mark J. Winter at 2025 N. Casaloma Drive, Appleton, WI 54913.

8. The Defendant, APL, is a for-profit Wisconsin limited partnership with its principal office located in Appleton, Wisconsin. APL is in the business of marketing, development, and sales of residential subdivisions, lots, and/or houses. APL is registered for service through its registered agent, Mark J. Winter at 3003 W. College Ave, Appleton, WI 54914.

9. The Defendant, BFP, is a for-profit Wisconsin limited liability company with its principal office located in Appleton, Wisconsin. BFP is in the business of marketing, development, and sales of residential subdivisions, lots, and/or houses. BFP is registered for service through its registered agent, Mark J. Winter at 2025 N. Casaloma Drive, Appleton, WI 54913.

10. The Defendant, MPL, is a for-profit Wisconsin limited liability company with its principal office located in Appleton, Wisconsin. MPL is in the business of marketing, development, and sales of residential subdivisions, lots, and/or houses. MPL is registered for service through its registered agent, Mark J. Winter at 2025 N. Casaloma Drive, Appleton, WI 54913.

11. Winter is an individual and officer, director, manager and/or principal of MWH, Elements, and Custom who resides in Winnebago County, Wisconsin. Service

may be had upon Winters at 8203 Golf Course Drive, Neenah, WI 54956, or 2025 N. Casaloma Drive, Appleton, WI 54913, or wherever he may be found.

Facts

12. Since the early 1980's, DB has been a major publisher of plan catalogs, in which its works, as well as those of its related entities – such as PPI – are marketed. Since the advent of the internet, DB and PPI have marketed their works through publishing their designs on DB's website, www.designbasics.com, and through their marketing partners. Consequently, Plaintiffs' designs have become ubiquitous in the marketplace.

13. DB is the sole original author and owner of a large number of architectural works, including those entitled the "Bethany," the "Ellies Knoll," the "Winter Woods," the "Weaver," and the "Hepburn."

14. PPI is the sole original author and owner of a large number of architectural works, including the one entitled the "Babineaux" (DB's and PPI's copyright-protected plans hereinafter will be collectively referred to as the "Copyright Works").

15. **Exhibit 1** attached hereto is a true and correct copy of the Registration Certificate issued by the U.S. Copyright Office for DB 3123 the "Bethany;"

16. **Exhibit 2** attached hereto is a true and correct copy of the Registration Certificate issued by the U.S. Copyright Office for DB 8027 the "Ellies Knoll;"

17. **Exhibit 3** attached hereto is a true and correct copy of the Registration Certificate issued by the U.S. Copyright Office for DB 8091 the "Winter Woods;"

18. **Exhibit 4** attached hereto is a true and correct copy of the Registration Certificate issued by the U.S. Copyright Office for DB 8509 the "Weaver;"

19. **Exhibit 5** attached hereto is a true and correct copy of the Registration Certificate issued by the U.S. Copyright Office for DB 42065 the "Hepburn;"

20. **Exhibit 6** attached hereto is a true and correct copy of the Registration Certificate issued by the U.S. Copyright Office for PPI 29321 the "Babineaux;"

21. The Copyrighted Works described in paragraphs 13 through 20 above were independently created by DB and PPI. In creating these works, Plaintiffs met the required "minimal degree of creativity" in architectural design, both as pictorial works and to the designs themselves as architectural works. The Copyrighted Works each contain the following non-exhaustive list of protectable elements:

a. The relationship, arrangement and composition of the spaces and elements;

b. The spatial relationships of the spaces and elements to all other spaces and elements;

c. The sizes and shapes of the rooms, and their spatial relationships to each other;

d. The arrangement and spatial relationships of the walls, flue chases, drop-downs, windows and doors within the floor plan;

e. The locations and spatial relationships between and among the placement of appliances, counter tops, and cabinets;

f. The placement of closets throughout the house;

g. The locations of and spatial relationships between and among toilets, shower/tubs and lavatories in the bathrooms;

h. The locations of porches, entryways, patios and front and rear or patio doors; *and*

i. The overall form of the houses, including but not limited to the "look and feel'' of the plan/design (including both the floor plan and outside elevation), and the manner in which the traffic flows through the house.

22. Defendants engaged, at least in part, in the business of drafting, publishing, distributing, and advertising residential home designs through traditional print media and on the internet on sites such as www.MarkWinterHomes.com. On April 30, 2014 Plaintiffs first became aware that the Defendants had violated their copyrights in one or more distinct ways. On said date, and in the course of marketing its works to previous customers, Plaintiffs saw several infringements of their Copyrighted Works on Defendants' website, www.MarkWinterHomes.com and preserved them by making screen captures (**Exhibit 7**). The works discovered at that time were:

a. DB's "Bethany," which Defendants call the "Sunridge"
b. DB's "Ellies Knoll," which Defendants call the "Sunridge"
c. DB's "Winter Woods," which Defendants call the "Amhurst"
d. DB's "Winter Woods," which Defendants call the "Ashford" & "Ashford II"
e. DB's "Weaver," which Defendants call the "Sunridge"
f. DB's "Hepburn," which Defendants call the "Doral"
g. PPI's "Babineaux," which Defendants call the "Kingswood" & "Kingswood II"

23. Since January 21, 1990, Defendants have collectively ordered and received at least seventy-one (71) of Plaintiffs' plan catalogs, each containing several dozen different designs and elevations. However, of all the accused infringers herein, only one – MWH – ever purchased a license to construct any of DB's plan designs.[1] With the exception of DB's "Hepburn" plan and PPI's "Babineaux" plan, all of the Copyrighted Works at issue in this case were within one or more of the seventy-one design plan catalogs ordered and received by "Mark Winter Homes." Attached hereto as **Exhibit 8** is Defendants' Customer Order History forms with Plaintiffs.

24. All of the Copyrighted Works within these plan catalogs and/or publications which were mailed to and received by Defendants, prominently displayed Plaintiffs' copyright management information ("CMI"), ensuring that anyone who received said plan catalogs and/or publications would understand that Plaintiffs own all rights and title to the Copyrighted Works. Additionally, each of these plan catalogs prominently displays the URL for DB's website, and explains that without the purchase of a license, use of the designs displayed in the catalogs is copyright infringement. (**Exhibit 9**).

25. Additionally, all of Plaintiffs' plan designs, including the Copyrighted Works, have been marketed for years on a nationwide basis, including in this District, by means of widespread distribution of design plan catalogs, periodicals, and other publications including by third-party marketers, as well as through internet marketing efforts, including but not limited to the website, www.designbasics.com. More

[1] DB's "Sancroft," which is not at issue in this matter.

specifically, on information and belief, MWH has been a member of the National Association of Home Builders, Wisconsin Builders Association, and Home Builders Association of the Fox Cities for many years. As a result of one or more of these memberships, MWH would have received several free DB periodicals yearly, each containing several house designs and elevations. Therefore, at all times material to this case, Defendants have had a reasonable opportunity to have viewed the Copyrighted Works at issue.

26. In addition to posting infringing copies of DB's Copyrighted Works and/or derivatives of them on Defendants' website for the purposes of advertising, marketing, and/or promotion, on information and belief, one or more of the Defendants received revenue attributable to the construction, marketing, and/or sale of one or more three-dimensional infringing copies (houses) of these works, and/or from the development of subdivisions where such revenue was realized through the sales of lots.

27. Each three-dimensional copy constructed by Defendants, as alleged in paragraph 21 (a) – (g) above, constitutes a derivative work which infringes Plaintiff's copyright-protected works in violation of 17 U.S.C. §§106(2) and 501.

Contributory and/or Vicarious Liability of Principals

28. Because Winters is a principal, owner, officer, and/or manager of the Entity Defendants, or otherwise had control of them, he had knowledge of the Entity Defendants' infringing activities, and/or materially contributed to the infringement by providing real estate development, management, appraisal, advertising, marketing, sales

and/or other services in furtherance of the Entity Defendants' copying, distributing, marketing, construction, and/or sales of known infringing designs and houses.

29. The conduct of the Entity Defendants described above was performed and/or accomplished through the direction, control and conduct of Winters personally, as owner, officer, director and/or manager of the Entity Defendants. Winters had the right and ability to supervise the infringing activities, including but not limited to preventing the Entity Defendants from infringing Plaintiffs' Copyrighted Works, and/or stopping the infringements once they began. Additionally, on information and belief, Winters received direct financial benefit from the acts of infringement by the Entity Defendants. Accordingly, Winters is personally liable to Plaintiffs as a joint and/or contributory infringer, or are otherwise vicariously liable.

30. The illicit acts of the Defendants, described in paragraphs 21 through 29 above were done without permission or license from Plaintiffs, and in violation of Plaintiffs' exclusive copyrights in said works.

31. Upon information and belief, Defendants have infringed Plaintiffs' copyrights in others of their architectural works, the scope and breadth of which infringing activities will be ascertained during the course of discovery.

Causes of Action for Non-Willful Copyright Infringement
Count One

32. Plaintiffs re-allege and incorporate paragraphs 1 through 31 above as if fully set forth herein.

33. Defendants, without knowledge or intent, infringed Plaintiffs' copyrights in one or more of Plaintiffs' works identified and described in paragraphs 13 through 20

above, by scanning, copying, and/or reproducing unauthorized copies thereof, in violation of 17 U.S.C. §106(1), and on information and belief, have done so with others of Plaintiffs' works which are as yet undiscovered.

Count Two

34. Plaintiffs re-allege and incorporate paragraphs 1 through 31 above as if fully set forth herein.

35. Defendants, without knowledge or intent, infringed Plaintiffs' copyrights in one or more of Plaintiffs' works identified and described in paragraphs 13 through 20 above, by publicly displaying, on their web site(s) and elsewhere, for purposes of advertising and marketing, unauthorized copies or derivatives thereof, in violation of 17 U.S.C. §106(5), and on information and belief, have done so with others of Plaintiffs' works which are as yet undiscovered.

Count Three

36. Plaintiffs re-allege and incorporate paragraphs 1 through 31 above as if fully set forth herein.

37. Defendants, without knowledge or intent, infringed Plaintiffs' copyrights in one or more of Plaintiffs' works identified and described in paragraphs 13 through 20 above, by creating derivatives of Plaintiffs' works in the form of two dimensional plans and fully constructed residences, in violation of 17 U.S.C. §106(2), and on information and belief, have done so with others of Plaintiffs' works which are as yet undiscovered.

Count Four

38. Plaintiffs re-allege and incorporate paragraphs 1 through 31 above as if fully set forth herein.

39. Defendants, without knowledge or intent, infringed Plaintiffs' copyrights in one or more of Plaintiffs' works identified and described in paragraphs 13 through 20 above, by advertising, marketing and/or selling one or more houses based upon copies or derivatives of said works, in violation of 17 U.S.C. §106(3), and on information and belief, have done so with others of Plaintiffs' works which are as yet undiscovered.

Alternative Causes of Action for Willful Copyright Infringement
Count Five

40. Plaintiffs re-allege and incorporate paragraphs 1 through 39 above as if fully set forth herein.

41. Alternatively, Defendants willfully infringed Plaintiffs' copyrights in one or more of Plaintiffs' works identified and described in paragraphs 13 through 20 above, by scanning, copying, and/or reproducing unauthorized copies thereof, in violation of 17 U.S.C. §106(1), and on information and belief have done so with others of Plaintiffs' works which are as yet undiscovered.

Count Six

42. Plaintiffs re-allege and incorporate paragraphs 1 through 39 above as if fully set forth herein.

43. Alternatively, Defendants willfully infringed Plaintiffs' copyrights in one or more of Plaintiffs' works identified and described in paragraphs 13 through 20 above, by publicly displaying, on their web site(s) and elsewhere, for purposes of advertising

and marketing, unauthorized copies or derivatives thereof, in violation of 17 U.S.C. §106(5), and on information and belief, have done so with others of Plaintiffs' works which are as yet undiscovered.

Count Seven

44. Plaintiffs re-allege and incorporate paragraphs 1 through 39 above as if fully set forth herein.

45. Alternatively, Defendants willfully infringed Plaintiffs' copyrights in one or more of Plaintiffs' works identified and described in paragraphs 13 through 20 above, by creating derivatives therefrom in the form of two dimensional plans and fully constructed residences in violation of 17 U.S.C. §106(2), and on information and belief, have done so with others of Plaintiffs' works which are as yet undiscovered.

Count Eight

46. Plaintiffs re-allege and incorporate paragraphs 1 through 39 above as if fully set forth herein.

47. Alternatively, Defendants willfully infringed Plaintiffs' copyright in one or more of Plaintiffs' works identified and described in paragraphs 13 through 20 above, by advertising, marketing and/or selling one or more houses based upon copies or derivatives of said works, in violation of 17 U.S.C. §106(3) and on information and belief, have done so with others of Plaintiffs' works which are as yet undiscovered.

Violations of DMCA § 1202
Count Nine

48. Plaintiffs re-allege and incorporate paragraphs 1 through 47 above as if fully set forth herein. Additionally and alternatively, one or more of the Defendants

violated §1202 *et seq.* of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. §1202.

49. In creating the drawings identified above, one or more of said Defendants intentionally removed and omitted Plaintiffs' copyright management information ("CMI"), or had them removed or omitted from copies of Plaintiffs' works.

50. One or more of said Defendants thereafter distributed copies or derivatives of such works knowing that such CMI had been removed or omitted without authorization.

51. At the time said Defendants removed Plaintiffs' CMI from copies of their works, and at the time they distributed copies of the works from which the CMI had been removed or omitted, said Defendants knew or had reasonable grounds to know that such behavior would induce, enable, facilitate or conceal the infringement of Plaintiffs' copyrights.

52. Plaintiffs are entitled and seeks to recover from Defendants statutory damages not exceeding $25,000 for each act committed in violation of their rights under 17 U.S.C. §1202, *et seq*.

53. Pursuant to 17 U.S.C. §1203(b)(5), Plaintiffs are entitled to and seeks to recover their reasonable attorneys' fees.

Conclusion and Prayer

WHEREFORE, Plaintiffs demand that judgment be entered in their favor and against the Defendants jointly and severally, as follows:

A. For an accounting by Defendants of their activities in connection with their infringements of Plaintiffs' copyrights in and to the above-described works, as well as of the gross profits and revenue attributable to their infringement(s);

B. For Plaintiffs' actual damages, in an amount to be determined at trial;

C. For Defendants' direct and indirect profits attributable to their infringements, including but not limited to those direct and indirect profits derived from the construction, advertising, promotion, marketing, appraisal and sale of infringing structures in an amount to be determined at trial;

D. In the alternative, at Plaintiffs' option an award of statutory damages in lieu of actual damages for the infringement of any one or more of their works described above, in an amount to be determined at trial;

E. An award of statutory damages for each and every violation by Defendants of the DMCA, 17 U.S.C. §1202, *et seq.*;

F. Plaintiffs' actual attorney fees, court costs, taxable costs, and the cost associated with the retention, preparation and testimony of expert witnesses;

F. For both temporary and permanent injunctions barring Defendants, their agents, employees and/or servants, from infringing Plaintiffs' copyrights in any manner whatsoever, including the advertising, marketing, construction, and sale of infringing structures, and further barring said Defendants from publishing through any visual media, and from selling, marketing or otherwise distributing copies of Plaintiffs' plans and/or derivatives thereof;

G. An order requiring Defendants to produce, for impounding during the pendency of this action and for destruction thereafter, all house plans and elevations which infringe Plaintiffs' copyrights, including all photographs, blueprints, film negatives, magnetic tapes, digitally scanned and/or stored images, and all machines and devices by which such infringing copies may be reproduced, viewed or disseminated, which are in the possession of, or under the direct or indirect control of the Defendants;

H. An order permanently enjoining the current owners of all infringing structures sold by Defendants from leasing, renting, selling and/or otherwise placing into the stream of commerce the infringing structures, based upon the application of the first sale doctrine; and

I. For such other relief as the Court determines to be just and equitable.

Date: April 28, 2016

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